solely by the employer loses the aspect of a charity; while the hospital service to which the employees contribute appears all the more clearly to be a purely business arrangement.

It may be suggested further that any corporation which maintains a company hospital as a part of its plant derives profit therefrom because it is able directly to minimize damage suits for injuries to its workmen.[10] This suggestion is based upon the idea that a hospital service, as an integral part of the organization, is the employer's additional means of providing against the inevitable accidents of modern industry. The same ideas that have led to Workman's Compensation Acts,[11] which look upon industrial accidents as inevitable, and without making distinction as to fault between master and servant, provide insurance against the consequent economic losses, may be carried out on parallel lines to establish the employer's duty to provide, maintain, and be responsible for, an adequate hospital service for its employees. This duty is obviously a legal one, and is not related to any of the customary concepts of true charity.

A. B. M.

PUBLIC RECORDS: RIGHT OF INSPECTION: EVIDENCE: EXCLUSION OF PUBLIC RECORDS FROM INSPECTION BECAUSE OF PRIVILEGE —The recently aroused interest in municipal government has created a conviction that if a municipality is to function efficiently, complete information in regard to its activities must be available to its citizens. This is especially so where projects involving the management and expenditure of large amounts of capital are undertaken. The only method of obtaining such information is through inspection of the data and documents embodying the results of the work. The San Francisco Bureau of Municipal Research[1] undertook such an investigation of the Hetch-Hetchy project. But the city engineer refused to allow the inspection of

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[10] Haggerty v. St. Louis, K. & N. W. R. Co., n. 8, supra.

[11] Western Indemnity Co. v. Pillsbury (1915) 170 Cal. 686, 693, 151 Pac. 398; Western Metal Supply Co. v. Pillsbury (1916) 172 Cal. 407, 421, 156 Pac. 491. These cases, upholding the constitutionality of California's Workmen's Compensation Act, discuss the reasons for this and similar enactments in clear and persuasive language. Compare also the Report of the Wainwright Commission, quoted in Honnold on Workmen's Compensation, Sects. 1-5; Schneider on Workmen's Compensation, Sect. 1, and numerous authorities there cited.

[1] The Bureau is a non-profit corporation with its principal place of business in San Francisco. Its object is to secure "the highest possible degree of efficiency and economy in the transaction of public business, particularly in the municipality of San Francisco, through investigating, collecting, classifying, studying and interpreting facts concerning the powers, duties, actions, etc., of the several departments of government and making such information available to public officials and citizens. . . ." San Francisco Bureau of Municipal Research v. Board of Public Works (Dec. 9, 1921) 62 Cal. Dec. 636, 202 Pac. 884.

any data except that which he had approved and transmitted to the Board of Public Works, excluding all data and computations prepared by his office force upon which he based his own conclusions and all material prepared by his office for the use of the city attorney in pending litigation. The case of *Coldwell v. Board of Public Works*[2] holds that the petitioner is entitled to a writ of mandate ordering that all excluded data be open to inspection.

Although the court decided that the data excluded because not finally approved did not constitute public records, it made that decision immaterial by granting the right of inspection upon other grounds. The Political Code provides that "The public records and other matters in the office of any officer are at all times, during office hours, open to the inspection of any citizen of this state."[3] The court held that these data could be classified as such "other matters," and defined that term as all data concerning a project in which the public as a whole have an interest, prepared by public officers and employees at public expense.[4] Everything in the city engineer's office prepared in connection with the Hetch-Hetchy project was thrown open to inspection. The court was probably influenced by the fact that the only possible means of ascertaining the efficiency of the office force and of testing the reasonableness of the city engineer's conclusions was by an inspection of these data. This case establishes the sound rule that a citizen or organization of citizens may inspect all data concerning any activity of the state or municipality irrespective of their character as public records.

The same result would have been reached had the court followed the theory of the analogous case of Mushet v. Department of Public Service,[5] wherein the petitioner sought to inspect the accounts and books of the electric light, heat and power system operated by the City of Los Angeles. The District Court of Appeal held that because the books were kept in connection with a business operated by the city in its proprietary capacity, they were not public records. The right of inspection was granted, however, on the theory that a taxpayer has the same right to inspect the books of a public utility run by a municipality as a stockholder has to inspect the books of the corporation.[6] Supply-

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[2] (Dec. 9, 1921) 62 Cal. Dec. 629, 202 Pac. 879. This case establishes the right of the citizen to the writ of mandate, while its companion case, supra, n. 1, establishes the same right in the corporation.

[3] Cal. Pol. Code, § 1032.

[4] See the dictum in Whelan v. Superior Court (1896) 114 Cal. 548, 46 Pac. 468, wherein the court distinguishes between matter in the hands of a sheriff which concerns his relation to an attaching creditor as agent, and that which is public.

[5] (1917) 35 Cal. App. 630, 170 Pac. 653.

[6] Hobbes v. Tom Reed Gold Mines Co. (1913) 164 Cal. 497, 129 Pac. 781, 43 L. R. A. (N. S.) 1112 and note; Guthrie v. Harkness, 199 U. S. 153, 50 L. Ed. 131, 26 Sup. Ct. Rep. 4, 4 Ann. Cas. 433; see also 2 Cook, Corporations, § 511 on the common-law right of the stockholder to inspect the books of the corporation.

ing a municipality with water and maintaining an electric system for its benefit are alike private enterprises.[7] The principal case cites and purports to follow the Mushet case, but in effect overrules it,[8] since the data finally approved and transmitted to the Board of Public Works would also be private records of the city.

The section of the Code of Civil Procedure which opens all public writings to inspection[9] has been made mere surplusage by this decision. Everything covered by it and much additional material is accessible under the Political Code.[10] The application of the former section has been strictly limited to public records, or public writings as they are therein named. The question then arises: What are public records? Decided cases lay down no satisfactory test.[11] Some jurisdictions hold that documents are public records only when they are required by law to be kept,[12] while others flatly repudiate this test.[13] The Code provisions are not illuminating. Public writings are classified as laws, judicial

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[7] Marin Water Co. v. Town of Sausalito (1914) 168 Cal. 587, 595 Pac. 767; South Pasadena v. Pasadena Land Co. (1908) 152 Cal. 579, 93 Pac. 490.

[8] The principal case states, supra, n. 2, p. 234, "In that case it was held that the documents were public records, although the city in operating the electric system was engaging in a private enterprise as a proprietor," yet the Mushet case, supra, n. 5, p. 635, says: "It is contended that, as all the properties and instrumentalities used in the conduct of the business are the private property of the city, the books of account showing the conduct of the business . . . must also be its private property. This would seem to be a just estimate of the situation. At any rate, we are convinced that the books and papers in question are not public documents as that term is used in the sections of the Code now under review." Either there has been a misprint in the report or the court erred in its interpretation of the earlier case.

[9] "Every citizen has a right to inspect and take a copy of any public writing of this state except as otherwise expressly provided by statute." Cal. Code Civ. Proc., § 1892.

[10] Supra, n. 3.

[11] The cases seemed to have been decided upon the advisability of allowing the inspection rather than upon their character as public records. An alcalde's book, kept at his option, was held to be a public record in Kyburg v. Perkins (1856) 6 Cal. 674; similarly, a school census prepared for its convenience by a board of education, Harrison v. Powers (1912) 19 Cal. App. 762, 127 Pac. 818; the records of vital statistics, Neville v. Board of Health (1892) 21 N. Y. Supp. 574; marriage licenses and returns, Kalamazoo Gazette Co. v. Vosburg (1907) 148 Mich. 460, 111 N. W. 1070; tax sales books not required to be kept, Burton v. Tuite (1889) 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73; the written evidence upon which a board acted in failing to award contract to the lowest bidder, Matter of Egan (1912) 205 N. Y. 147, 98 N. E. 467; letters of recommendation relied on in granting liquor licenses, Ferry v. Williams, 41 N. J. Law 332, 32 Am. Rep. 219. A letter attacking the character of the superintendent of a state insane asylum, in the custody of the secretary of the institution, was held to be not a public record in Colnon v. Orr (1886) 71 Cal. 43, 11 Pac. 814.

[12] State v. Reed (1905) 36 Wash. 308, 79 Pac. 306; Barrickman v. Lyman (1913) 155 Ky. 723, 160 S. W. 267.

[13] Barrickman v. Lyman, supra, n. 12; Kyburg v. Perkins, supra, n. 11; People v. Tomalty (1910) 14 Cal. App. 224, 111 Pac. 513.

records, other official documents, and public records of private writings,[14] and are defined as the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive.[15] The principal case holds that preliminary matter prepared by subordinates of a public officer and unapproved by him are not public records, but that his approval elevates them to that dignity. But no criterion is established to determine who are public officers. The city engineer and his subordinates are alike subordinates of the Board of Public Works and are appointed by it under the authorization of the charter.[16] The line might have been drawn where the data have been relied upon in an act which binds the city. The provision of the Penal Code that any alteration of public records is a felony[17] makes a determination of this point a matter of practical importance. Under the principle of this case the city engineer could not correct any error of computation or withdraw any papers after having granted his approval without subjecting himself to criminal prosecution.[18] This would unduly hamper the city's administration of a public utility. It would seem that a more rational test of a public record would consist in whether or not it has such an element of finality that rights and obligations of the public or of private individuals may be explained, affected, or created by it.

The other group of data was excluded by the trial court on the ground that it had been prepared for the use of the city attorney in pending litigation and was therefore privileged.[19] The Supreme Court held that the attorney-client privilege, being a testimonial privilege, did not affect the right of inspection.[20] The protection given communications made to an officer in official

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[14] Cal. Code of Civ. Proc., § 1894.

[15] Cal. Code of Civ. Proc., § 1888.

[16] Charters of San Francisco, Art. 6, Ch. 1, § 11, Cal. State. 1899, p. 288; and Art. 6, Ch. 1, § 9, subd. 8, as amended by Cal. Stats. 1921, p. 1390.

[17] Cal. Penal Code, §§ 113, 114.

[18] People v. O'Brien (1892) 96 Cal. 171, 31 Pac. 45; People v. Tomalty, supra, n. 13.

[19] Cal. Code Civ. Proc., § 1881, subd. 2.

[20] The attorney-client privilege protected communications between the city attorney and the municipal authorities in People v. Gilon (1889) 9 N. Y. Supp. 243; it was also recognized in a dictum in City of Rockford v. Falvey (1888) 27 Ill. App. 604. Since these cases are old and not of the highest authority, it may be questioned whether a city may properly claim the attorney-client privilege against a citizen thereof. The city attorney represents the citizens in their corporate capacity; in the following cases it was held that where an attorney represents two or more parties communications made to him are not privileged inter sese: Harris v. Harris (1902) 136 Cal. 379, 69 Pac. 23, followed in Smith v. Smith (1916) 173 Cal. 725, 161 Pac. 495; Hurlburt v. Hurlburt, 128 N. Y. 420, 26 Am. St. Rep. 482; Stewart v. Todd (1919) 173 N. W. 619 (Iowa); Brown v. Moosic Mountain Coal Co. (1905) 211 Pa. 577, 6 Atl. 76.

confidence[21] was held to have been forfeited because these data had been shown to a third party. There is a dictum to the effect that if the confidential character of the communications had not been waived, they could not have been inspected. Thus data otherwise open to inspection would be kept secret if they were being prepared for the city attorney, by operation of the same rule of evidence that would justify the attorney in refusing to produce them at the trial. The right to inspect public documents may be considered analogous to the right of discovery of private documents before trial.[22] Since documents which are privileged at the trial are protected from discovery before trial,[23] the protection afforded official confidential communications should operate retroactively to protect them from inspection by either a third party or the adverse party.[24] It would seem that such a rule would be justified in that it gives the city the greatest degree of freedom in preparing its case.

H. R. M.

RESTRAINT OF TRADE: "OPEN COMPETITION PLAN" VIOLATES SHERMAN ANTI-TRUST ACT—*American Column and Lumber Company v. United States*[1] reaffirms the general attitude of the United States Supreme Court as to the meaning of "monopoly" under the Sherman Act,[2] but the case goes one step further and declares the so-called "Open Competition Plan" to be a violation of the statute.

Section one of the Sherman Act[3] is applicable to the principal case. It reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Though it was earlier held in the Freight Association Case[4] that "in restraint of trade or commerce" includes any direct restraint, even though absolutely reasonable, yet the Standard Oil Case[5] later established the common-law "rule of

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[21] Cal. Code Civ. Proc., § 1881, subd. 5.

[22] Cal. Code Civ. Proc., §§ 1000, 1985, 1986.

[23] Arnold v. Chesebrough, 41 Fed. 74; Mott v. Consumers' Ice. Co. (1876) 52 How. Prac. 149; Lowenthal v. Leonard (1897) 46 N. Y. Supp. 818.

[24] Wigmore points out that at common law precisely the opposite result was reached where discovery was permitted because of the right of inspection of corporate or manorial records, even though there existed no general right of discovery. 3 Wigmore, § 1858, p. 2436.

[1] (Dec. 19, 1921) 42 Sup. Ct. Rep. 114, U. S. Adv. Ops. 1922, p. 159.

[2] Act of July 2, 1890, c. 647, 26 U. S. Stat. at L. 114, U. S. Comp. St. (1918) §§ 8820-8823, 8827-8830, Barnes' Fed. Code (1919) §§ 7944-7975, 9 Fed. St. Ann. (2d ed.) 644.

[3] Supra, n. 2.

[4] United States v. Trans-Missouri Freight Association (1897) 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. Rep. 540. Reaffirmed in United States v. Joint-Traffic Association (1898) 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. Rep. 25.

[5] Standard Oil Co. v. United States (1911) 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502, 34 L. R. A. (N. S.) 834.